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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

HARRY T. GRAHAM, INDIVIDUALLY AND AS former collector of internal revenue, et al., petitioners,
v.
ALFRED I. DUPONT, RESPONDENT.
No. 846.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

I.

THE AMOUNT OF THE TAX DUE TO THE UNITED STATES FROM THE RESPONDENT CAN NOT BE DETERMINED IN A SUIT FOR INJUNCTION TO RESTRAIN THE COLLECTION OF THE ASSESSMENT.

The respondent devotes a large part of his brief to an attempt to show that the amount of the assessment was larger than it should have been by the overvaluation of the distributed stock. We decline to be drawn into an argument on that point in this appeal.

The *amount* of the tax due to the United States depends directly upon the fair market value of the shares of stock of E. I. duPont de Nemours & Co.

on the date of their distribution as a dividend to the respondent. The value of such shares was determined to be $347.50 by the Commissioner of Internal Revenue in making the assessment, and by the Court of Claims in *Phellis* v. *United States*, 56 Ct. Cls. 157.

In order to obtain any judicial review of the Commissioner's assessment *as to the amount thereof*, respondent must first pay the tax under protest, file his claim for the refunding thereof within the time limit prescribed by law (Sec. 252, Revenue Act of 1921, as amended by the Act of March 4, 1923, Public No. 527), and if the claim is rejected or held for six months without a decision bring an action at law for the recovery back of the amount of tax paid (Sec. 3226, Revised Statutes, as amended by Sec. 1318 of the Revenue Act of 1921).

The statutes prescribe certain conditions upon which the Government consents to be sued in such matters and without complying with the prescribed conditions a taxpayer has no standing in any court to test the accuracy or validity of a tax assessment.

Howland v. *Soule*, Fed. Cas. 6800, Deady, 413;

Kissinger v. *Bean*, Fed. Cas. 7853, 7 Biss. 60;

Alkan v. *Bean*, 23 Int. Rev. Rec. 351, Fed. Cas. 202;

Kensett v. *Stivers*, 10 Fed. 517;

Snyder v. *Marks*, 109 U. S. 189, 193;

Kohlhamer v. *Smietanka*, 239 Fed. 408, 411;

Calkins v. *Smietanka*, 240 Fed. 138.

"Men must turn square corners when they deal with the Government. If it attaches purely formal conditions to its consent to be sued those conditions must be complied with." *R. I., Ark. & La. R. R. Co.* v. *United States*, 254 U. S. 141, 143.

II.

THE ASSESSMENT OF THE TAX MADE BY THE COMMISSIONER OF INTERNAL REVENUE IN DECEMBER, 1919, WAS LEGAL AND ITS COLLECTION BY DISTRAINT WAS NOT BARRED BY SECTION 250 (d) OF THE REVENUE ACT OF 1921 OR ANY OTHER STATUTE.

Outside of the attempt of the respondent to show that the valuation of the shares of stock was incorrect the only other grounds for relief insisted upon in his brief are the following:

1. "The alleged assessment under authority of which the distraint is proposed to be made is without authority of law, illegal, and void."

2. "The threatened distraint would be in violation of the express inhibition of Section 250 (d) of the Revenue Act of 1921."

These contentions will be considered in their respective order.

1. The assessment made by the Commissioner is legal. Viewed either in the light of the limitation contained in Section II E of the Income Tax Act of October 3, 1913, under which the tax was assessed, or under Section 250 (d) of the Revenue Act of 1918, if applicable, the assessment of the Commissioner was made within the statutory period and was a legal assessment. The assessment was made within

five years and was therefore within the limitation prescribed by the later Act. Whether the Act of 1918 applies only to taxes imposed thereunder may be an open question. The return was due and was made March 1, 1916, and the assessment was made on the December, 1919, list.

The assessment in this case was made under the Income Tax Act of October 3, 1913, Section II E of which provides:

> E. That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of *refusal or neglect* to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment.

By the word "false" contained in the foregoing paragraph is not meant "fraudulent," but merely untrue or incorrect. *Woods* v. *Llewellyn*, 252 Fed. 106; *Eliot Natl. Bank* v. *Gill* (D. C.) 210 Fed. 933, 939; *id.* 218 Fed. 600, 602, 134 C. C. A. 358; *Natl.*

Bank v. *Allen*, 223 Fed. 472, 478, 139 C. C. A. 20; *United States* v. *Nashville & St. Louis Ry.*, 249 Fed. 678, 161 C. C. A. 588. In any event the failure of the respondent to make a return of the income in question was a "refusal or neglect." Fraud is not essential. Respondent's return for the year 1915 was untrue and incorrect in the light of the decision of the Supreme Court in the *Phellis case*, in that he refused or neglected to make a return of the income received by him during said year in the form of common stock of the Delaware corporation. Consequently, it was clearly lawful for the Commissioner to assess the amount of tax due, upon the discovery thereof at any time within three years after the return was due.

Respondent's return for 1915 was due and was made March 1, 1916. That it was incorrect was discovered by the Commissioner in November, 1917. (Rec. p. 34.) A return upon information was made for him and he was notified of the amount due within three years of such discovery. (Rec. p. 57.) The amount of additional taxes due for the year 1915 was formally assessed against him in December, 1919, but the assessment was not enforced because of his claim for abatement and the agreement to await the decision of the Supreme Court in the *Phellis case*.

Under Section II E of the 1913 Act, if the discovery of the falsity of the return was made within three years the assessment could be made at any time thereafter. In the case of *Eliot National Bank* v. *Gill*, 218 Fed. 600, the Circuit Court of Appeals

for the First Circuit, construing similar provisions of the Corporation Excise Tax Act of August 5, 1909, held that the three-year limitation runs from the discovery that the return is incorrect or fraudulent rather than upon the assessment after such discovery. Dodge, Circuit Judge, delivering the opinion of the court, said:

> "The Commissioner's discovery of the facts regarding these deductions was made within three years after March 1, 1910, the year wherein the first of the three returns, afterward found erroneous, namely, that for 1909, was due, and his assessment of the amount of the deductions was made March 1, 1913. In the case of 'false or fraudulent' returns, the fifth subdivision of Section 38 of the act gives the Commissioner power 'upon the discovery thereof, at any time within three years after said return is due,' to make an additional assessment. *We agree with the District Court that this language does not prevent the making of the assessment after, if the discovery has been within, the three years.*" [Italics ours.] 218 Fed. 602.

And in *Penrose* v. *Skinner*, the District Court of the United States for the District of Colorado, where the same question was raised under the 1913 Act, said:

> "And on the second proposition above noted I would hold against the contention of the plaintiff, if it were now necessary to definitely rule upon it. *National Bank of Commerce* v. *Allen*, 223 Fed. 472, 139 C. C. A. 20; *Nat'l Bank* v. *Gill*, 218 Fed. 600, 134 C. C. A. 358.

> The language of the statute construed in those cases is identical with that found in the statute here under consideration in respect to the question raised." 278 Fed. 284, 286, 287.

The construction of the courts in the above-mentioned cases is correct, in that it gives effect to the words "upon the discovery thereof," whereas the construction contended for by the respondent is impossible without eliminating such words from consideration. Effect must be given to all the words of a statute, where possible.

Moreover, the construction of the courts agrees with the departmental construction of the Act of August 5, 1909, and the Act of October 3, 1913, and such has been the continuous and uniform construction of the Department ever since the enactment of said statutes. In case of ambiguity in a statute, contemporaneous and uniform executive construction is regarded as decisive and it should not be disturbed except for the most cogent reasons (*Brown, Admx.*, v. *United States*, 113 U. S. 568; *Shell's Exrs.* v. *Fauche*, 138 U. S. 562; *Fairbank* v. *United States*, 181 U. S. 283, 311).

The construction of the language of Sec. II E by the Circuit Court of Appeals for the First Circuit in *Eliot Natl. Bank* v. *Gill*, supra, was not "dicta," as stated in the brief of respondent. The question was actually involved in the case, as is clearly shown by the foregoing quotation from the opinion of the court.

Respondent in his brief raises other questions as to the legality of the assessment and discusses them at considerable length. Such, for example, as that Section II E of the Income Tax Act of October 3, 1913, requires a "return on information" to be made by the Commissioner, and that the return in this case was not (*a*) in the prescribed form, (*b*) made by the Commissioner himself or the collector or deputy collector, but was made by a revenue agent, (*c*) made within three years after the due date of the return, (*d*) and did not show the exact amount of tax as was shown by the assessment.

The foregoing objections to the form and manner of making the assessment are not entitled to consideration in this form of proceeding. At the most, they affect merely the regularity of the assessment and not the right of the respondent to relief in a court of equity. Such questions can be raised only in an action at law to recover back the tax after payment.

Nothing could be better settled by the decisions of this court than that neither the accuracy nor the validity of an assessment of a tax can be determined in a suit for injunction to restrain its collection. *Snyder* v. *Marks*, 109 U. S. 189; *Dodge* v. *Osborn*, 240 U. S. 118; *Pacific Whaling Company* v. *United States*, 187 U. S. 447.

This court has repeatedly held that the payment of a tax assessment is a necessary condition precedent to the right of a taxpayer to maintain a suit

to test its validity. *State R. R. Tax Cases*, 92 U. S. 575, 613; *Cheatham* v. *United States*, 92 U. S. 85, 88; *Bailey, Coll'r* v. *George et al.*, 259 U. S. 16.

III.

DISTRAINT FOR THE COLLECTION OF THE ASSESSMENT WOULD NOT VIOLATE SECTION 250 (d) OF THE REVENUE ACT OF 1921; AND EVEN IF IT DID, THE REMEDY WOULD NOT BE BY INJUNCTION TO RESTRAIN THE COLLECTION OF THE TAX.

The respondent contends that the threatened collection of the tax by distraint would be in violation of Section 250 (d) of the Revenue Act of 1921, because more than five years from the due date of the tax had expired before collection was attempted, and said Section 250 (d) contains a five-year limitation upon the collection of the tax by distraint, regardless of when the assessment was made.

The respondent misconstrues Section 250 (d). It does not contain a five-year limitation upon the collection by distraint of taxes due and assessed under the Income Tax Act of 1913. The applicable part of Section 250 (d) reads as follows:

> (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under

> section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act. * * *.

In this conjunctive provision, a limitation upon two separate acts is contemplated, (1) upon assessment, and (2) upon a "suit or proceeding."

Are these limitations separate and independent of each other or do they together form one limitation?

Is the limitation upon judicial remedy conditioned upon and a part of the preceding limitation as to assessments?

The Government submits that the latter construction is correct. Indeed, it is the only reasonable construction which would at once make the limitation fully workable and protect the public revenues.

There is normally and naturally a substantial interval of time between assessment and the judicial

proceeding to enforce it. When the assessment is made the taxpayer is notified and given a reasonable time to pay it. When that time has elapsed without payment a further notice is given to him either of a distraint or a suit. Distraint is almost invariably the remedy, as the Government rarely resorts to an action of law, and the distraint is always preceded by an admonitory notice, which again lengthens the interval between assessment and action to collect.

Bearing this in mind it is significant that the period of time within which an assessment must be made and the judicial proceedings begun *is the same* (four years as to one class of tax and five years as to another). If, therefore, the two limitations upon (1) assessment and (2) collections are separate and independent, it is strange that the same period of time should be allowed in both cases. It was intended that the Government could have the full period of time within which to assess. If it took the full time any interval between assessment and distraint or a suit at law would be impossible and, therefore, to construe the two limitations as separate and independent of each other would mean that either the period for assessment would be shortened or that the taxpayer would be unfairly treated by an assessment being *immediately* followed by a distraint or suit at law without notice and without any opportunity on the part of the taxpayer to pay the assessment before he either found his property seized or himself a defendant in a suit.

Such a construction is plainly unreasonable and as unfair to the taxpayer as to the Government. It is therefore necessary to find a more reasonable construction.

Such a construction is found in the second view which we have already suggested, and that is, that the provision contains a single limitation providing that *when taxes are not assessed within the statutory period,* there can thereafter be no suit or proceeding in the courts to enforce the liability.

Congress obviously meant that the Government could have the prescribed period of years to assess the tax, and recognizing the preexisting law that it could sue to enforce a tax liability *even though there were no assessment,* it further provided, in order to make its limitation effective, that *when the Government had not assessed the tax within the prescribed period* it could not sue in the courts, either at common law or in equity, to enforce the unassessed liability of the taxpayer.

If, however, the taxes were assessed within the prescribed period, then the limitation as to a "suit or proceeding" had no application and a suit could be begun at any time.

This construction is in harmony with the entire scheme of taxation, for a tax when assessed has always been a definite liability, and remains a perpetual lien upon the taxpayer's real estate and it was never intended that when a tax was once assessed that the taxpayer could escape by a limita-

tion of time. To do this would be to put a premium upon the neglect to pay taxes duly assessed.

What Congress did mean, as previously explained, was that if the Government did not do the taxpayer the justice of assessing the tax within the prescribed period, it could not thereafter enforce his general liability to pay the tax by any suit or proceeding in the courts.

The language of the section sustains this reasonable and practical construction, for it is to be noted that the provision says that "No suit or proceeding for the collection of any *such* taxes due under this act, or under prior income excess profits or war profits tax acts, or under any taxes due under section 38 of such act of August 5, 1909." What is the significance of "such"? It does not refer to the Acts under which the taxes were imposed, for specific reference is made to them in the section just quoted. "Such taxes" evidently refer to taxes *that have not been assessed* within the prescribed period.

Apart from these considerations there remains the further question, whether the limitation of a "suit or proceeding" does not have exclusive reference to proceedings in the courts. If so, it does not limit the power of distraint.

Obviously Congress simply closed the doors of its courts upon the collection of taxes not assessed within the prescribed period.

Such a limitation, working gross inequality between those who pay their taxes and those who refuse to

pay them, should be strictly construed. It does not in words refer to the executive power of distraint. The words used are the appropriate words to a judicial proceeding of any kind, whether it be a suit in the nature of a common-law action or one in equity.

To apply the limitation to the executive power of distraint it is necessary to read something into the act in favor of the slothful or unwilling taxpayer. The tax when assessed remains a lien upon the taxpayer's real estate. Will it be contended that a limitation upon a suit or proceeding involves the destruction of the statutory lien, and if the statutory lien remains, why should not the power to distrain?

Where an assessment is made no "suit or proceeding" is necessary to collect the tax. The assessment when made becomes "a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person." (Sec. 3186 R. S.)

The collection of a tax by distraint after assessment is an authorized and time-honored method employed by the Government, and it rarely resorts to judicial proceedings for the collection of its revenue. (Sec. 3184 R. S., et seq.) An assessment of a tax obviates the necessity of a suit for its collection. It would be unreasonable, therefore, to assume that Congress by

the second limitation contained in Section 250 (d) intended such limitation to apply to taxes that had been assessed within the time limit prescribed by the first limitation contained in said section.

As we have shown in our main brief, any other construction would make the provisions inconsistent with other provisions of the Act, and would reduce the five-year limitation upon assessments to less than five years. It is a principle recognized by this court that statutes should be construed, if practicable, that one section will explain and support and not defeat or destroy another section. *Bernier* v. *Bernier*, 147 U. S. 242.

Furthermore, an assessment becomes a lien on all the property of the taxpayer under Sec. 3186, and requires no judgment of a court for its satisfaction. An assessment is unnecessary as the basis of a suit to recover taxes, and a suit is unnecessary where there is a valid assessment. To hold that the right to distrain is limited to five years after the due date of the tax, as is the right to assess, would be to destroy the force and effect of an assessment, if made near the end of the five-year period. We find it impossible to believe that Congress intended, by its enactment of Section 250 (d) to destroy the effect of a large number of the then outstanding assessments.

As indicative of the intention of Congress, the following excerpts are taken from the report of Senator Penrose, Chairman of the Committee on

Finance, Report No. 275, 67th Congress, First Session, Calendar 289, Senate, p. 21, part IV.—Administrative Provisions. Payment of taxes * * *:

> The laws relating to the time within which assessments may be made, suits brought for the collection of taxes, refunds or credits for taxes filed, and *court actions* instituted for the recovery of taxes illegally or erroneously collected have in the past been uncertain and annoying to taxpayers.
>
> By Section 1322 of this bill the time for the making of an assessment increase of taxes other than income, excess-profits, war-profits, or corporation excise taxes under the act of August 5, 1909, has been limited to four years after the tax became due. In section 250 (d) the time for assessing income, excess-profits, and war-profits taxes under this bill has been limited to four years, and under prior acts to five years.
>
> Section 1320 of this bill prevents the bringing of any *suit or proceeding* by the Government *in any court* for the collection of internal-revenue taxes after the expiration of five years from the time such tax was due, except in the case of fraud. Heretofore, except in the case of income, excess-profits, and war-profits taxes under the revenue act of 1918, there was no limit upon the time in which the Government could bring suit for the collection of taxes. *Subdivision (d) of Section 250 contains limitations with respect to income and profits taxes similar to those contained in section 1320.* [Italics ours.]

P. 32. Limitations upon suits and prosecutions.

> Section 1320 prevents the bringing of any *suit or proceeding* by the Government *in any court* for the collection of internal-revenue taxes after the expiration of five years from the time such tax was due, except in the case of fraud or a willful attempt to defeat or evade tax. (See Sec. 250, Title II.) [Italics ours.]

The phraseology of Sec. 1320 of the Revenue Act of 1921 is—

"No suit or proceeding for the collection of any taxes shall be begun," etc. The Chairman of the Committee says this refers to proceeding "in any court for the collection of internal-revenue taxes" and that the limitation of 250 (d) with regard to suits is the same.

Respondent's entire argument is based upon the position that the word "proceeding" includes "distraint." He is sticking in the letter of the statute and not reaching its substance. The word "proceeding" has been used over and over again by Congress in conjunction with the word "suit" to refer to judicial proceedings and to judicial proceedings alone. Throughout the statutes of the United States the words are used together and separately, interchangeably and synonymously to refer to judicial proceedings, but never to executive action. (Revised Statutes, Sections 771, 774, 838, 3207, 3213, 3214, 3227, 3226.)

The references in respondent's brief (page 25) to the word "proceedings" in the Revised Statutes of the United States in connection with the collection of taxes by distraint are misleading. He refers to the publisher's headnotes, and not to the language of the statutes. Thus, the West Publishing Company's titles in U. S. Comp. Stat., 1916, are:

> Sec. 5912 (R. S. 3190). "Proceedings on Distraint,"
>
> Sec. 5919 (R. S. 3197). "Proceedings for Seizure and Sale of Real Estate for Taxes," and
>
> Sec. 5929 (R. S. 3207). "Proceedings in Chancery to Subject Real Estate to Payment of Tax."

But the word "proceedings" is not used in the statutes themselves.

The result of respondent's construction, if adopted, would be arbitrary action and the elimination of all consideration of the merits of the case after the making of the assessment. It would result in great hardship to taxpayers to have their property seized and sold without an opportunity to delay as much as a day to raise the money to pay the assessment, or else it would operate to deprive the Government of its revenue by barring the collection after assessment.

Conceding for the sake of argument that the construction of Section 250 (d) is doubtful; even so, the rule in cases of doubtful construction is not that "the doubt is to be resolved in favor of the taxpayer," as stated in respondent's brief, with a quota-

tion from 22 Cyc. 1605. It is only where there is doubt as to whether the statute levies a tax upon a particular person or thing that the doubt has been resolved in favor of the taxpayer by this court. *Gould* v. *Gould*, 245 U. S. 151. There is no question in this case that the respondent is a taxable person or that the dividends received by him were taxable as income. *United States* v. *Phellis*, 257 U. S. 156. He is seeking exemption from taxation through a technicality, and such exemptions are to be strictly construed against the person claiming the exemption. *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146. To exempt a taxpayer from an admitted tax by reason of a limitation on remedy is to create inequality among taxpayers in favor of those who delay the payment of taxes and against those who promptly make return and pay. All doubts should be resolved against such an inequality.

IV.

RESPONDENT CAN PAY THE TAX AND FILE A CLAIM FOR THE REFUNDING THEREOF UNDER SECTION 252 OF THE REVENUE ACT OF 1921, AS AMENDED BY THE ACT OF MARCH 4, 1921 (PUBLIC NO. 527).

Replying to the argument in respondent's brief that there is no statute under which he can file a claim for refund if he pays the tax, we invite the attention of the court to Section 252 of the Revenue Act of 1921, as amended by the Act of March 4, 1923 (Public No. 527), under the provisions of which respondent can file a claim for refund at any time within two years after the payment of the tax. The

material parts of Section 252, as amended, are quoted on page 3 of petitioners' main brief. Under Section 252, as amended, respondent can file a claim for refund or credit within two years after payment of the tax, and if his claim is rejected or held by the Commissioner for six months without a decision, he can commence a suit for the recovery back of the tax under Section 3226 of the Revised Statutes, as amended by Section 1318 of the Revenue Act of 1921, and the Act of March 4, 1923, quoted in petitioners' main brief on page 4 (see also T. D. 3462, amending Article 1039, Regulations 62, Income Tax, 1922 Ed.; T. D. 3463, amending Article 1050, Regs. 63; and T. D. 3457, dated March 17, 1923).

V.

THE CASES CITED BY RESPONDENT FAIL TO SUPPORT HIS POSITION.

The case of *Woods* v. *Llewellyn*, 252 Fed. 106, 109, cited on page 22 of respondent's brief in support of his contention that the assessment must be made within three years after the due date of the return is not in point. In that case the tax for 1913 was assessed in May, 1915, and the court held that the assessment *"was in time under Paragraph E if the plaintiff's return was 'false.'"* (Italics ours.) The court did not hold that an assessment made after three years from the due date of the return would not have been in time if the discovery had been made within three years.

In *Hill* v. *Wallace*, 259 U. S. 44, no tax was assessed by the Commissioner or sought to be collected by the collector. The collection of a tax was not therefore restrained, because none had been asserted.

The case of *Ledbetter* v. *Bailey*, 224 Fed. 375, 380, 381, cited in respondent's brief at page 30, involved the collection of a "penalty" under Section 35 of the National Prohibition Act, and not a tax for revenue purposes. It was in harmony with the decision of this court in *Lipke* v. *Lederer*, 42 Sup. Ct. 549, but it is inapplicable to the facts in the case at bar.

The quotation from the opinion of the district court in *Polk* v. *Page*, 276 Fed. 128, 133, cited on page 30 of respondent's brief, is not entitled to weight because the decision of the district court was reversed by the Circuit Court of Appeals for the First Circuit in *Page* v. *Polk*, 281 Fed. 74 (see also *Nichols*, v. *Gaston et al.*, 281 Fed. 67), in which the Circuit Court of Appeals for the First Circuit held that a suit for the purpose of restraining the collection of a federal estate tax could not be maintained, even though the collection by distraint was premature.

In *Frayser* v. *Russell*, Fed. Cas. No. 5067, 20 Fed. Cas. 728, 3 Hughes 227, cited by respondent at page 31, the collection of the tax was enjoined because, in the language of the court, "the proper tax had already been paid" and the additional tax "was a demand for what this court had solemnly and finally in another case adjudicated not to be a tax." Quite different from the case at bar where the assessment

sought to be collected has been "solemnly and finally in another case" (*United States* v. *Phellis*, 257 U. S. 156) *adjudicated to be a tax.* Moreover, as stated by Mr. Justice Blatchford in *Kensett* v. *Stivers*, 10 Fed. 527, after citing cases in support of the principle that the collection of a tax can not be restrained, "That case does not impugn the principles laid down in the other cases already cited; and that, if it did, the weight of authority is against it."

Ogden City v. *Armstrong*, 168 U. S. 224, cited in respondent's brief at page 32 did not involve a federal tax.

CONCLUSION.

Section 3224, R. S., was adopted by Congress in pursuance of the sound public policy that there should be no unnecessary delays in the collection of the public revenue.

The principle that the collection of Federal taxes could not be restrained had come to be so thoroughly understood and accepted by the legal profession and the general public that suits for injunctions were very rare after the decision of this court in *Snyder* v. *Marks*, 109 U. S. 189, up to the time of the publication of the opinion of the district court in this case (*Du Pont* v. *Graham*, 283 Fed. 300), and the decision of the District Court of the United States for the District of Rhode Island in the case of *Polk* v. *Page*, 276 Fed. 128 (reversed by the Circuit Court of Appeals for the First Circuit in *Page* v. *Polk* et al., 281 Fed.

74). Since these decisions, equity suits to enjoin the collection of taxes have sprung up as mushrooms. We append a list of these cases, and they will show how great the burden will hereafter be upon this and other Federal courts, if this remedy for an injunction is permitted in violation of the Act of Congress.

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APRIL, 1923.

APPENDIX.

Suits for Injunction to Restrain the Collection of Taxes.

1. *Weingold et al.* v. *Bowers*, So. Dist. New York. Filed March, 1922 (5 cases).

These were known as the "Furrier Cases." They were the outgrowth of a conspiracy to defraud the Government. A former deputy collector counterfeited the "received payment" stamp used in the office of the Collector of Internal Revenue in New York, and with it stamped the monthly lists of sales of manufacturers of fur garments to show that the sales tax thereon had been paid. His plan was to accept 80% of the amount of tax due the Government and to allow the furriers the balance as their profit from the transaction. When the fraud was discovered all unpaid taxes were assessed against the furriers and warrants of distraint issued to enforce collection. To prevent the attachment of their property the furriers filed bills in equity to restrain the collection of the taxes. Hon. Julian Mack, District Judge, granted temporary restraining orders in each case. The temporary restraining orders have since been dissolved. The taxes have been collected and some of the furriers have been convicted under the penal provisions of the revenue laws. These cases are unreported.

2. *Solomon Brodsky* v. *Ferguson, Coll'r.* Filed July, 1922, Dist. New Jersey (unreported).

Solomon Brodsky was alleged to have made large profits from the bootlegging business. He kept no books that could be found and made no returns of his profits for the purpose of the income tax. The only available method of determining his profits was by an examination of his bank account and an estimate of the amount of net income based upon the total amount of his deposits for the year. This method was followed and an assessment made and payment demanded, with threats of collection by distraint. Brodsky filed a bill in equity to restrain the collection of the income tax so assessed. This bill was afterwards dismissed and the tax collected.

3. *Union Fishermen's Cooperative Packing Co.* v. *Huntley,* Dist. of Oregon. Filed January, 1923 (unreported).

This was a bill in equity to restrain the collection of an additional assessment of income tax based on a disallowance of an amount of depreciation claimed by the taxpayer. On the defendant's motion to dismiss the bill of complaint the motion was granted by District Judge Wolverton, who handed down a brief opinion holding that such a proceeding is barred by Section 3224, R. S.

4. *Allan Black* v. *Rafferty, Collector.* Filed February, 1923, Eastern District New York.

This was another bootlegger case. The additional assessment of income tax was in the sum of $525,768.43, the payment of which was demanded by the collector, with threats of distraint upon plaintiff's property unless the same was paid in compliance with the demand. On motion to dismiss

the bill District Judge Garvin granted the motion, holding that the case was not within the decision in the duPont case, or within the decision of the Supreme Court in the cases of *Regal Drug Corporation* v. *Wardell*, and *Lipke* v. *Lederer*. (Unreported, T. D. 3456.)

5. *People's Savings Association* v. *Nauts, Coll'r.*
Filed March, 1923, Northern District Ohio.

This is a suit in equity to restrain the collection of capital-stock taxes on the ground that the plaintiff, being a domestic building and loan association not operating for profit, it is not subject to the tax. A motion has been made to dismiss the bill of complaint, but decision thereon is being deferred by District Judge Killitts.

6. *Rock Island Butter Co.* v. *Nauts, Coll'r.*
Filed August, 1922, Northern District Ohio.

This is a suit for injunction to restrain the collection of a special tax as a manufacturer of adulterant butter, on the ground that the plaintiff is not such a manufacturer. A motion has been made to dismiss the bill, but decision on the motion is being deferred by Judge Killitts.

7. *Chicago Fig & Date Co.* v. *Cannon, Coll'r.*
8. *T. N. Catrevos & Co.* v. *Cannon, Coll'r.*
Dist. Court, No. Dist. Illinois.

These are suits for injunction to restrain the collection of the manufacturers' sales tax on candy, on the ground that stuffed dates manufactured by the plaintiffs are not candy within the meaning of the act. Motions have been made to dismiss the bills of complaint, but decision thereon has been deferred by the court.

9. *Alice N. Whiting* v. *Woodworth, Coll'r.* Filed October, 1922, Eastern District of Michigan.

This is a suit for injunction to restrain the collection of an income tax assessed against the plaintiff on account of income received by her in the form of stock of the General Motors Corporation. The case is practically on all fours with the du Pont case and is being held in abeyance pending the decision of the latter case.

10. *Hernandez* v. *McGhee.* Filed June, 1922, District of New Mexico.

The collection of income tax in this case was restrained by District Judge Neblett. The tax was for the year 1913, but no return was made by the delinquent taxpayer. The case is now pending on appeal in the Circuit Court of Appeals for the Eighth Circuit, and will be heard at St. Paul during the May term.

11. *Lloyd W. Seaman* v. *Bowers, Coll'r.* Filed February, 1923, Southern District of New York.

This is a suit for injunction to restrain the collection of an income tax. A temporary restraining order was granted by Judge Learned Hand. Plaintiff's motion for a preliminary injunction and defendant's motion to dismiss the bill of complaint were argued to Judge Augustus Hand. The matter is still pending.

12. *Ansco Co.* v. *Gage, Coll'r.* Filed February, 1923, Eastern District New York.

In this case District Judge Cooper has issued a temporary restraining order to restrain the collection by the collector of an assessment of income tax against the plaintiff and to restrain the collector from

proceeding against the taxpayer's bondsmen. The temporary restraining order is still in effect.

13. *Isaac Baker* v. *Olson, Coll'r.* Filed September, 1922, District of North Dakota.

This is a suit for injunction to restrain the collection of an income tax. On defendant's motion to dismiss the bill the motion was granted and the plaintiff appealed to the Circuit Court of Appeals for the Eighth Circuit. The case is now pending on appeal.

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